No. 96-815

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

GERALD D. D'AMELIA, JR.,

Petitioner,

FRANCIS D. PHILLIPS, II,

Defendant,

against

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED—

Does an assistant district attorney's dismissal of criminal charges, conditioned upon a defendant's swearing her innocence on a bible in a church, fall outside his prosecutorial function depriving him of absolute immunity?

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BRIEF IN OPPOSITION TO THE PETITION
SUMMARY OF THE ARGUMENT

Until now, it apparently has never crossed the mind of a single prosecutor, either state or federal, to use a forced religious ceremony as a method to dispose of criminal charges. As the District Court observed, "This conduct is so clearly outrageous and improper that no one ever tried it before, and that's why our research has found no case." (A-30)

The instant petition attempts to convince this Court that, given the right set of circumstances, a District Attorney's forcible compulsion of a criminal defendant to perform a religious ceremony in a church can be said to have a secular prosecutorial purpose.

The decisions of the Courts below state the obvious. Petitioner's conduct was performed outside of his role as a prosecutor as that role is historically understood. Petitioner is not entitled to absolute immunity because coerced religious practice serves no legitimate prosecutorial function. Religious-based dispositions have no place within the judicial process.

STATEMENT OF FACTS

Petitioner Gerald D. D'Amelia, Jr. ("D'Amelia") was the Orange County Assistant District Attorney responsible for the prosecution of the criminal charges against respondent Jane Doe ("Doe") and he conditioned dismissal of those charges upon

Doe's swearing on a bible in a Catholic Church that she was innocent.[1] There is no dispute that this religious exercise was not proposed by Doe or her attorney. According to D'Amelia, it was Doe's estranged husband, the father of the alleged victim, who recommended the procedure to D'Amelia, stating "that he preferred that the matter be resolved by the law of God rather than the law of man." (A-137) There is no dispute that D'Amelia implemented what the father "recommended" to him.

Among those present in the chapel during the ceremony were D'Amelia, Doe and her defense attorney Barbara Strauss, the father of the alleged victim, the alleged victim and his brother, a priest and perhaps another priest, the D.A.'s investigator, and Doe's mother and sister. D'Amelia held the bible and read from a prepared statement written in his hand while he had Doe place her hand on the bible and repeat after him. The prepared statement reads as follows: "I, [Jane Doe], swear on this bible that I did not have any form of sexual contact with my son Nicholas on any occasions, so help me God." Doe describes it this way:

> I entered the chapel. Anton [the father] and my children were kneeling, and Mr. D'Amelia was standing at the front of the chapel, and he told me to position myself across from him, and he read a statement and asked me to repeat those words, which I did.

(A-44)

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[1] On October 25, 1992, the police arrested Doe on felony charges that she sexually abused her 14 year old son. On April 30, 1993, D'Amelia advised Doe's attorney, Barbara Strauss, that it was his intention to reduce the felony charges to misdemeanors and prosecute them in the justice court unless Doe agreed to the aforesaid religious exercise.

When the ceremony was concluded, D'Amelia went to the justice court and presented an order of dismissal of all the charges for the court's signature.

ARGUMENT

D'AMELIA IS NOT ENTITLED TO ABSOLUTE IMMUNITY

D'Amelia is not entitled to absolute immunity because his conduct was undeniably outside the scope of his prosecutorial function.

There is no question that a prosecutor's *decision* whether or not to pursue a criminal charge is protected by absolute immunity. But D'Amelia's argument goes much further. He is arguing that "conduct performed in the context of deciding" (Petition, page 4) is also necessarily within the prosecutor's function, no matter what that conduct might be. No court has ever held this.

By applying the required "functional approach" (*see Buckley v Fitzsimmons*, 113 S.Ct. 2606, 2613 (1993)), the Court of Appeals below correctly isolated "the nature of the conduct that was allegedly intertwined with the prosecutorial decision" (A-11) and concluded "that D'Amelia had no colorable claim of jurisdiction *qua* prosecutor to enforce the laws not of man but of God." (A-13) D'Amelia's religious conduct, in other words, is not the functional equivalent of deciding whether or not to prosecute, *See Buckley v Fitzsimmons*, 113 S.Ct. at 2613.

A

"Absolute immunity will apply to a prosecutor's conduct that is 'intimately associated with the judicial phase of the criminal process.' " *Dory v Ryan*, 25 F.3d 81, 83 (2nd Cir. 1994) *quoting Buckley v Fitzsimmons*, 113 S.Ct. at 2614. The decision of whether or not to prosecute, in itself, is one such form of conduct that is always "intimately associated" with the judicial phase. It is a necessary, indeed integral, part of a prosecutor's role as an advocate. But this does not mean that *any* conduct that might be peformed in the context of that decision is likewise "intimately associated" or necessary.

"Deciding whether or not to prosecute" is a distinct, clearly delineated form of conduct. It is an analytical process involving such operations as determining the seriousness of the charges, assessing the sufficiency of the evidence, and evaluating the credibility of the witnesses and character of the accused. Although the variables considered by a prosecutor while "deciding" what to do with a case might be numerous and diverse, it does not follow that his decision-making permits equally numerous and diverse forms of conduct or coercive demands that supposedly assist in the making of the decision. D'Amelia ignores the conceptual difference between "deciding" and "demanding" when he insists that absolute immunity extends not only to the prosecutor's decision, but also to any

conduct which the prosecutor might perform in connection with that decision.[2]

B

D'Amelia cites cases in his Petition (page 14) which make clear that the federal courts have deemed certain prosecutorial demands to be intertwined with the decision whether to prosecute, even when those demands violate a criminal defendant's constitutional rights. What all of these cases have in common, however, and what distinguishes them from the instant case, is that the constitutional rights that were claimed to have been violated by the prosecutor's demands were all *personal* rights. D'Amelia's demand, on the other hand, violated the Establishment Clause which protects a *public* right.[3]

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[2] To ignore this distinction would be dangerous for it would mean that *any* time a prosecutor conditions a dismissal he would be deemed to be acting as an advocate—no matter what that condition might be. As the Second Circuit made clear, this kind of reasoning takes immunity too far:

> The fact that a conditional decision with regard to prosecution may be protected by absolute immunity does not mean . . . that the prosecutor may with impunity couple a threat of prosecution with all manner of demands, for example, demands for bribes or sexual favors. A government official does not have absolute immunity for acts that are 'manifestly or palpably beyond his authority,' *Spalding v Vilas*, 161 U.S. 483, 498, 16 S.Ct. 631, jurisdiction.'(citation)

Schloss v Bouse, 876 F.2d 287, 291 (2nd Cir. 1989). "[W]hen a prosecutor acts without any colorable claim of authority," the Second Circuit continued, "he loses the absolute immunity he would otherwise enjoy." *Id. quoting*, *Barr v Abrams*, 810 F.2d 358, 361 (2d Cir. 1987)

[3] "The 'exercise' of Establishment Clause rights differs from the exercise of most other constitutional rights, in that it is in essence a public matter. . . " *Scarpino v Grosshiem*, 852 F.Supp. 798, 804 (S.D. Iowa 1994)

Prosecutorial demands that infringe upon personal rights may be "intimately associated" with the prosecutorial function because personal rights are routinely balanced against legitimate State objectives; it is well settled that under certain circumstances the State may have a legitimate interest in abridging the exercise of a personal right.[4] But no court has *ever* utilized a balancing test under the Establishment Clause: "Such balancing has never been applied by the Supreme Court in an Establishment Clause case." *Matter of Griffin v Coughlin,* 88 N.Y.2d 674, 694 n 7 (1996), *cert den* ___ U.S. ___ (January 6, 1997). This is because the State *never* has a legitimate interest, no matter what the circumstances, in forcing someone to engage in religious exercise.

In each of the cases which D'Amelia cites—where the claim was based upon the decision whether to continue or dismiss a proceeding—the prosecutor received absolute immunity because he was, in effect, performing an historically recognized balancing process. The prosecutor was balancing the State's objectives against the claimant's personal constitutional right(s), and was therefore engaged in conduct very similar to the balancing routinely engaged in by the courts. This is conduct which is *not* foreign to the prosecutor's function as an advocate precisely

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[4] *See, e.g., Rankin v McPherson,* 107 S.Ct. 2891, 2896-2897 (1987), *quoting and citing Pickering v Board of Education,* 88 S.Ct. 1731, 1734-1735 (1968); *Connick v Myers,* 103 S.Ct. 1684, 1686 (1983): "The determination whether a public employer has properly discharged an employee for engaging in speech requires 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "

because it is a recognized function of the judicial process.[5] "Indeed, in deciding whether or not to prosecute, the prosecutor performs a 'quasi-judicial' function." *Imbler v Pachtman,* 96 S.Ct. 984, 998 (1976) Although a prosecutor's—just as a judge's—failure to reach a proper balance might result in a constitutional violation, the balancing process itself remains "intimately associated"—within the meaning of *Imbler v Pachtman*—with the judicial phase of the proceeding.

On the other hand, because no similar form of balancing is *permitted* under the Establishment Clause, D'Amelia's conduct cannot be said to be even remotely associated—let alone "intimately associated"—with any known or historically recognized judicial process. D'Amelia's demand that Doe enter the church with him is simply not part of any historically acknowledged judicial or prosecutorial decision-making process. D'Amelia's demand is something that, in the American legal system, no judicial or quasi-judicial officer ever performs. D'Amelia's religious test, therefore, is completely foreign to the American prosecutor's function as an advocate before the court.

Thus the Second Circuit's rejection of D'Amelia's argument is based upon firmly settled Establishment Clause jurisprudence. D'Amelia only begs the question when he insists that his religious demand was made in the context of his "prosecutorial decision". The fact remains that coercing a defendant to perform a religious exercise is "manifestly" and "palpably" outside the

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[5] The Circuit Courts of Appeals have sometimes described the prosecutor's immunity as a form of "quasi-judicial" immunity, and have referred to it as "derivative" of the immunity of judges. *Imbler v Pachtman,* 96 S.Ct. at 990.

context of any decision which a prosecutor is permitted to make.[6]

The historical traditions of First Amendment jurisprudence are at war with D'Amelia's entire argument.

C

In order for D'Amelia's argument to prevail, he must demonstrate that not immunizing him for his religious exercise will "have an adverse affect upon the functioning of the criminal justice system." *Imbler v Pachtman*, 424 U.S. 409, 426 (1976) This D'Amelia cannot do because there is no historical or practical basis for suggesting that resort to a religious exercise is in any way necessary or "intimately associated" with a prosecutor's ability to perform as an advocate. This is what distinguishes this case from those immunity cases involving the subornation of perjury and falsification of evidence by prosecutors.

Encouraging perjury (*see Dory v Ryan*, 25 F.3d 81), although unethical and immoral, is nevertheless inextricably intertwined—for purposes of absolute immunity analysis—with the prosecutorial functional of preparing a witness. The prosecutorial misconduct cannot be separated from the prosecutorial function without subjecting the prosecutor to unlimited and obstructive inquiry into his motives and decisions when preparing a witness. Similarly, making false representations to prompt a plea bargain (*see Pinaud v County of Suffolk*, 52 F.3d 1139) cannot be functionally separated from the process of plea

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[6] The fact that the idea may have come from the complainant and not from the prosecutor himself is, of course, a distinction without constitutional significance.

bargaining, itself. In such cases, subsequent civil litigation involving the prosecutor's conduct would necessarily impede the functioning of his office because the subsequent inquiry would, by necessity, force *all* prosecutors to make often difficult discretionary decisions regarding the presentation of evidence with the threat of such litigation in mind.[7]

It is this threat to legitimate prosecutors that gives force to the decisions that immunize prosecutors who break the law or act unethically. It is this threat that was the animating principle behind this Court's decision in *Imbler v Pachtman.*

But no prosecutor should feel threatened in any way by the imposition of liability upon prosecutors who require criminal defendants to perform religious exercises. This is precisely because no prosecutor should be considering the imposition of a religious test. No prosecutor should be thinking in such terms.

D

D'Amelia claims that his conduct had a "proper, secular prosecutorial purpose". (Petition, page 15) He states that this purpose was "to ascertain whether or not Doe committed the crime and, ultimately, to determine whether or not the complainants would cooperate in the prosecution." (Petition, page 15)

First, it should be pointed out that this rationale of ε truth finding function did not surface until D'Amelia's appeal to the

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[7] D'Amelia's observation that suborning perjury is more reprehensible than the religious exercise imposed here misses this point entirely. The issue is not which conduct is more reprehensible and should therefore not be immunized. The issue is which conduct is so intimately associated with the judicial process so as to require immunity.

Court of Appeals. Nothing in the trial record even suggests that D'Amelia used the religious ceremony to assist him in ascertaining whether or not Doe was being honest. Rather, D'Amelia initially admitted that the religious condition was imposed at the urging of Mr. Doe, the alleged victim's father.[8]

The uncontroverted record shows that after D'Amelia got the support of his fellow assistant district attorneys,[9] he decided that if Doe went through with the ceremony the charges would be dismissed. Nothing in either D'Amelia's affidavits or his deposition even hints at the idea that if Doe performed the ceremony and D'Amelia thought she was swearing falsely, then the prosecution would go forward. It had been decided ahead of time that if Doe performed the religious exercise, the charges would be dismissed. (Record on Appeal to Second Circuit, A-69) When D'Amelia was escorting Doe into the church, he was no longer in the process of trying "to ascertain whether or not [she] committed the crime" and it is disingenuous for him now to suggest otherwise.

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[8] In fact, D'Amelia's reply affidavit to the District Court (Record on Appeal in Second Circuit, A-203 to A-209) contradicts his present position by making it clear that he arrived at the disposition without ever resolving the issue of credibility: "After consideration of all the evidence, the issues of credibility, the inconsistencies, the position of Mr. Doe and the victim, and plaintiff's affirmation denying the charges, the ultimate disposition was considered as being in the best interests of the parties." (*Id*, A-208)

[9] It should also be noted that although D'Amelia's present attorneys now blame his conduct upon his inexperience, in the lower courts his then attorneys argued that his conduct was *reasonable* because he discussed his scheme beforehand with several other assistant district attorneys and none of them mentioned any problem with it.

Assuming, *arguendo*, that D'Amelia really was trying to determine whether Doe was telling the truth, the fact remains that he has no "colorable claim of authority" to impose a religious test upon a defendant to ascertain whether that defendant is innocent or guilty. D'Amelia's authority consisted of either dismissing the charges because he deemed them unfounded, or prosecuting them and giving Doe the opportunity to testify before the Grand Jury or at trial. His authority did not extend to requiring Doe to accompany him into a church in order to demonstrate that she was telling the truth.

D'Amelia, in effect, argues that as long as he characterizes his coerced church ceremony as truth-finding he acted with a colorable basis of authority and a semblance of jurisdiction, no matter how remote in fact that conduct may be from this particular prosecutorial function. Such logic would require the granting of absolute immunity to a prosecutor who might decide to use the medieval trial by ordeal. Since D'Amelia's truth-finding exercise in the church amounts to an appeal "to divine authority to decide the guilt or innocence of one accused of a crime," *The Columbia Encyclopedia,* Third Edition, page 1159,[10] it is not intellectually far removed from the primitive

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[10]The Columbia Encyclopedia describes the ordeal as follows:

> ancient legal custom connected closely with divination by an ordeal, appeal was made to divine authority to decide the guilt or innocence of one accused of a crime or to choose between disputants. This custom was known to primitive peoples as well as to those of fairly advanced material culture. Until recent times the ordeal was practiced in many parts of Asia and Africa. In the early Middle Ages it was widely used in settlement of legal questions in Western Europe, especially in the Germanic countries. In England it was a regular form of trial and persisted until trial by jury became

(continued...)

truth-finding methodologies that ended with the appearance of trials by jury.

Nevertheless, the dissent below adopts D'Amelia's argument *en toto* by stating that "D'Amelia had reason to think that that oath would fully serve the interests of the complainants, the defendant, the community and the prosecutorial office." (A-21) In effect, the dissent below adopts the reasoning of the medieval religious trial by claiming that Doe's oath in the church "had a secular, prosecutorial purpose . . . to ascertain whether Doe committed the crime and whether the complainants would cooperate in the prosecution." (A-20) The dissent below only concedes that "D'Amelia performed his prosecutorial role in an *unusual* manner". (emphasis added)

Of course, the religious nature of D'Amelia's ritual is not diminished by his—and the dissent's—analogy to the swearing of a witness on the stand. As observed by the Courts below, having Doe stand before the prosecutor in the chapel, place her hand on the bible the prosecutor was holding, and repeat, *verbatim*, the words that the prosecutor read aloud from a script, is quite distinct from asking a witness questions under oath. The latter, as the District Court properly found, is "largely secular" (A-29), while D'Amelia's exercise was devoid of secularity and "was, in fact, religious." (A-28)

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[10](...continued)

common. Forms of the ordeal varied with the locality and with the nature of the crime. The ordeal by fire—walking through fire or putting the hand into a flame—was common, and there were other fiery ordeals, such as walking on hot ploughshares or plunging the hand into molten metal or hot water. Usually it was believed that if the accused was innocent God would spare him. *Id.*

The Establishment Clause was inspired by the lesson that, in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. *Lee v Weisman*, 505 U.S. __, 120 L.Ed.2d 467, 483, 112 S.Ct. 2649 (1992) At a minimum, the First Amendment guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so. *Lynch v Donnelly*, 465 U.S. 668, 678 (1984).[11]

D'Amelia actually argued to the Second Circuit that stripping him of immunity in this case would "send a chilling signal to prosecutors." But the only signal that would be sent—and should be sent—is a command to keep church and state separate. Obeying that command in no way impinges upon the effective functioning of a criminal prosecutor.

The dangerous signal is the one that would be sent if this Court were to accept D'Amelia's argument. One can only imagine the damage to be done by mischievous/righteous prosecutors in many districts across this nation if they were given free rein to utilize all types of religious exercises and tests

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[11] Significant to the ramifications of this case is this Court's warning in *School District of Abington TP., PA. v Schempp*, 374 U.S. 203, 216 (1963):

> [I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' *Memorial and Remonstrance Against religious Assessments, quoted in Everson v Board of Education*, 330 U.S. 1, at 65.

Abington, 374 U.S. at 216. D'Amelia's "experiment" with Doe's liberties clearly went beyond the bounds of his prosecutorial function.

to dispose of criminal cases or to make the local church an annex of the district attorney's office.

CONCLUSION

D'Amelia's conduct was manifestly and palpably beyond his authority as a prosecutor and was not intertwined with any legitimate function of a prosecutor. D'Amelia is therefore not entitled to absolute immunity and the petition for a writ of certiorari should be denied.

Dated: Middletown, New York
January 27, 1997

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